

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of		
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Schools and Libraries Universal Service	)	
Support Mechanism	)	CC Docket No. 02-6

**Request for Review and Petition for Waiver for Southwest/West Central Service Cooperative**

On behalf of the Southwest/West Central Service Cooperative (SW/WC), I respectfully submit this request for review and petition for waiver related to USAC's Decisions on Appeal issued by the Universal Service Administrative Company ("USAC") on December 20, 2010.<sup>1</sup> This decision by USAC was the culmination of a multiyear process in which USAC has failed to credibly demonstrate that any violation of E-rate program rules occurred and in which USAC has repeatedly refused to explain the rationale(s) behind its decisions.

We request that the Commission review the evidence as presented herein and in our previous correspondence with USAC, and reverse the decision of USAC. Should the Commission determine that a technical violation of the rules did occur, we request that the Commission waive the rules in this case.

Southwest/West Central Service Cooperative is an education service agency (ESA) serving 18 counties spanning a 12,500 square mile area in southwest and west central Minnesota. The area served by SW/WC is overwhelmingly rural, with extremely limited access to high speed telecommunications services. At the time of the initial competitive bid addressed in this appeal, the highest speed connection available throughout most of the agency's service area was a single T-1. As a membership organization, SW/WC represents the more than 50,000 students through its 56 public school members and 22 non-

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<sup>1</sup> A listing of the applications and funding requests is included as Appendix I.

public and charter school members. Member districts can purchase services from SW/WC at their own discretion and are not required to purchase any of SW/WC's offerings.

The districts impacted by the FRNs included in this appeal are in an extremely rural area of Southwest Minnesota with an average population density ranging from 12 to 35 persons per square mile.<sup>2</sup> School districts encompass vast areas and often have low populations, and many districts have an overall matriculation of fewer than 500 students. Member school districts put thousands of miles on their school bus fleets per day, with some students spending nearly 3 hours each day on a school bus. The schools within SW/WC's service area are currently struggling to maintain class sizes large enough to maintain class offerings such as foreign language, advanced science and mathematics classes.

According to spring 2010 figures, an average of 9.28% of the households in the region are living in poverty. The State of Minnesota has experienced an unprecedented financial crisis for the past 3 years, and that crisis will likely continue into the foreseeable future. Because of this crisis SW/WC member school districts are spread thin financially, and the families and tax payers living in the SW/WC region have already been forced to endure local property tax increases in order to sustain their school districts as state funding has not been able to keep up. Such increases have placed a further strain on the already tight budgets of local households and communities.

All of these factors highlight the critical role that SW/WC plays in providing Wide Area Network (WAN) and Internet services to the Southwestern Minnesota region. Such resources play a vital role in educating the students of Southwest Minnesota. Technologies delivered through SW/WC's WAN and Internet Services allow participating schools to offer courses and other educational opportunities – such as virtual field trips and inter-school collaboration– to their students that would not otherwise be available. Many schools have begun offering courses over the WAN, including basic electives and career oriented courses such as animal science and foreign language instruction, using two-way interactive

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<sup>2</sup> Based on 2009 US Census Bureau Estimates found on <http://quickfacts.census.gov>

television so that students can meet the minimal requirements for high school graduation and college admission. Additionally a number of schools have adopted bandwidth intensive technologies in order to deliver essential special education services to speech and hearing impaired students across the region.

SW/WC currently provides special education, professional development, school improvement assistance, curriculum, cooperative purchasing, and information technology services to its member school districts. In the area of information technology specifically, SW/WC has coordinated the effort to bring a broadband network to participating member districts starting in E-rate Funding Year 2006 (July 1, 2006 – June 30, 2007). This network is the linchpin of a series of initiatives launched by SW/WC and member districts to bring the resources of the world to the prairies of Minnesota. In particular, the network has facilitated the extensive use of video for distance learning and Internet access for research and participation in collaborative projects across not only the state, but the country.<sup>3</sup> SW/WC member school districts use various state resources in order to complement and enhance the educational programming offered to students. For example, because of the services provided by SW/WC, member school districts have been able to take students on interactive video field trips to the Minnesota History Center. This program allows students in all grades to take a virtual field trip to the History Center in St. Paul, saving the time and expense incurred on the four hour (each way) bus ride traditionally required for such a field trip. Such sessions allow for timely and affordable enhancements to be made in many relevant areas of curriculum, not just history. Video conferencing is also used extensively for professional development activities and meetings that would normally require thousands of combined miles of travel among the participants, as well as days worth of lost hours, all for a single meeting. Inter-district meetings are conducted several times each month throughout the region, but in recent years internal district meetings have also been taking place several times a week using video conferencing over the WAN where school buildings within a single school district may be up to twenty miles apart.

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<sup>3</sup>For example, SW/WC SC participates in the Minnesota InforMNs project to coordinate the resources available at a national and international level for Video Conferencing and Internet2 resources. [www.informns.k12.mn.us](http://www.informns.k12.mn.us)

Without the high speeds of the WAN and Internet services provided by SW/WC, the ability of member districts to provide critical education and special education services to the students of Southwest Minnesota will be deeply impaired. The ability SW-WC to provide such infrastructure, services and essential technologies at rates affordable to these member school districts is not attainable without the assistance provided by the E-Rate program. Without E-Rate funding the SW/WC member school districts would be left at a huge disadvantage, not able to provide the type of quality and comprehensive education currently available to the students in Southwest Minnesota.

#### **Allegations Made by USAC are Inaccurate**

The allegations presented by the USAC concern three separate procurements related to the Wide Area Network. The first procurement was for the lease of a WAN and Internet access to serve SW/WC member school districts starting in FY2006. The second procurement was to add an additional school district (Jackson County) to the wide area network in FY2008. The final procurement, undertaken in FY2009, was to add additional Internet and Internet2 bandwidth to the existing wide area network. Such allegations are wholly unfounded and are based on recordkeeping errors on the part of Trillion Partners, Inc., not SW/WC. SW/WC and the member school districts it supports should not be penalized on the basis of such unfounded allegations.

In June 2009, USAC began requesting information related to the bid processes associated with the FRNs listed in Appendix I. These requests for information appear to have been rooted in the discovery of inappropriate gifts having been given to school district personnel in other school districts by representatives of Trillion Partners, Inc. (Trillion). While SW/WC cannot speak to the validity of these claims against other Trillion clients, the evidence in this case clearly demonstrates that the competitive bid process initiated and engaged in by SW/WC was not tainted and that denial and/or recovery of funds associated with these FRNs is wholly inappropriate.

The allegations from USAC have been founded on a number of obvious inaccuracies and inconsistencies in Trillion's recordkeeping. For example, USAC charged in its letter of 6/4/2010 that a number of expenses from Trillion were associated with SW/WC, including "meals, gift cards, and travel..." However, the documentation provided to SW/WC by USAC fail to demonstrate that any gifts were made to SW/WC prior to or during the competitive bid process. In fact, the only expense associated with SW/WC in USAC's documentation that pre-dates the award of the contract is a "Speaking Engagement" at the "CETPA" conference. As indicated in our response to USAC's letter of 6/4/2010, this expense appears to be attributed to SW/WC in error, since no such conference was attended by anyone at SW/WC, and no expense was incurred by Trillion to support SW/WC personnel. Upon research, as SW/WC was unaware what the "CETPA" conference was, SW/WC surmises that the conference in question was in fact the *California* Education Technology Professionals Association.<sup>4</sup> SW/WC is located in Minnesota and serves member school districts in Minnesota. No representatives of SW/WC attended any CETPA conference in California, on any date.

Similarly, although the allegation is made in the letter that gift cards were awarded to SW/WC staff, none of the expenses in the documentation provided by USAC would seem to support that allegation, and no SW/WC staff have indicated that they received gift cards or other inappropriate incentives from Trillion. In fact, all of the expenses listed appear to be either routine business expenses (such as a Trillion account representative seeking reimbursement for meals) or associated with the conferences Trillion held for its customers (at which SW/WC was invited to present).

In reliance on further records apparently provided by Trillion, USAC has also alleged that SW/WC received inappropriate meal expenses at various times. Specifically, USAC alleges that SW/WC was part

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<sup>4</sup> We have been unable to verify what the nature of this expense was, since the Commission or USAC has apparently instructed Trillion not to share such information with applicants. Therefore, it is conjecture that the CETPA conference mentioned is the California Education Technology Professionals Association conference; however, given that Trillion was a sponsor of subsequent CETPA conferences, it seems a reasonable inference. Regardless, SW/WC was not in any way involved in any conference with Trillion in 2005.

of both the \$204.70 “business lunch” and a \$136.38 “customer lunch” reported by Trillion. Strangely enough, both of lunches allegedly took place *on the same day* (August 8, 2007). While SW/WC was participating in a conference sponsored by Trillion on August 8, 2007, the expenses associated with the lunches appear to be wildly inaccurate at best.<sup>5</sup> Even assuming that the costs associated with a group lunch at a conference were accurate, the fact that both lunches supposedly took place on the same day alone calls into question the validity of the Trillion recordkeeping. Such questionable recordkeeping must call into question the validity of USAC’s total reliance on the records to reject SW/WC’s funding requests.

Moreover, due to such inaccuracies in the information relied on by USAC in making its allegations, SW/WC has been unable to actually determine what specific violations USAC believes to have occurred. USAC’s Decision on Appeal was no more helpful in deciphering the allegations against SW/WC than its initial letters. The opinion simply assumed that violations occurred without addressing, much less refuting, any of the specifics of SW/WC’s response or documenting what the purported violations actually were.

### **Summary of Procurements**

Given that USAC did not provide sufficient or accurate information about the allegations for SW/WC to be able to defend itself, SW/WC has chosen to set forth the events as they actually occurred, surmising there from as to what rules violations USAC might believe to have occurred.

#### ***WAN Procurement***

Prior to undertaking the initial leased WAN procurement, SW/WC sought information from vendors, other school districts and ESAs around the country regarding the options available. The region

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<sup>5</sup> The conferences sponsored by Trillion are dealt with in greater detail below.

served by SW/WC historically only had connectivity through various local phone companies. That connectivity (which typically maxed out at 1.5 Mbps) was entirely insufficient for the high bandwidth applications that SW/WC sought to make available to its participating member school districts. Wired connectivity through these carriers was also extremely expensive, particularly when compared to what similar connections would cost in more urban areas. For example, under agreements in place prior to the WAN procurement, the total cost per year of providing T-1 lines to all but four of the school districts for FY 2005 totaled over \$821,000, making the RFP response from Trillion extremely competitive in price (providing approximately 30 times as much Internet bandwidth as well as high speed connectivity to other members of the WAN for approximately the same cost as the T-1s).

Of particular interest to SW/WC were the WAN solutions suitable to the rural nature of the area served by SW/WC. In particular, SW/WC was seeking solutions with low installation and low ongoing costs. Preliminary research indicated that wireless services might be a suitable contender given the constraints faced by SW/WC. However, SW/WC's information technology staff had little to no experience with wireless broadband solutions; there were also significant concerns regarding viability given the rural nature of the area to be served and the severe weather challenges posed by the harsh Minnesota climate.

As part of a pre-bid feasibility study, SW/WC reached out to a number of vendors and ESAs around the country to discover more about wireless networking in order to determine whether wireless networking would be a good fit for SW/WC's needs. In the process of reaching out to these entities, SW/WC provided them with general information about SW/WC's member districts.<sup>6</sup> Such information

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<sup>6</sup> While the provision of this information appears to be one of the lynchpins of the allegations made by USAC, the information provided was all publicly available on the SW/WC website. As a public agency, SW/WC's membership is a matter of public record, and is customarily made available on the SW/WC website. See <http://www.swsc.org/16331037202934370/site/default.asp> for a listing of the current members; clicking the appropriate link on the left side of the page will provide a list of the current public school members, non-public school members, and charter school members, among others. An archived copy of this list from August 4, 2005,

was not “inside information” as it was publicly available through the SW/WC website, and as such, the information shared did not give any vendor an unfair advantage. Moreover, the listing provided to potential WAN services providers was not a listing of the districts actually interested in connecting to the WAN, nor did the listing contain the addresses where service would need to be delivered. Rather, it was simply a listing of SW/WC members and their addresses – again, all a matter of public record. A complete listing was not available until the release of the RFP (and establishing Form 470).

SW/WC also undertook two separate site visits to existing wireless broadband networks as part of its efforts to gather information. The first site visit was made with Trillion’s knowledge and support, and the second without Trillion’s knowledge. The site visits were purely for investigative purposes, seeking to determine the viability of using wireless networks to deploy a WAN, regardless of the wireless technology or the service provider used. The first visit, conducted in conjunction with Trillion, was to the North Texas Regional Education Telecommunications Network (NTRETN), an educational service agency (ESA) serving numerous sites throughout northern Texas. Please note that, SW/WC disclosed this trip to USAC on several occasions and USAC did not cite it as a potential reason for denial in the letter of 6/4/2010.

While SW/WC’s staff was impressed with the quality of the NTRETN network, the conditions in Texas are not analogous to those in southwest Minnesota, particularly with respect to the effects of intense cold and snow on the viability of wireless communications. Indeed, while the NTRETN site visit showed that wireless broadband was capable of delivering impressive speeds, it shed little or no light on whether such a solution would be suitable for SW/WC. Therefore, SW/WC undertook a second site visit, this time unbeknownst to Trillion, to the Widefield School District, serving the area around Colorado Springs. Since the Colorado Springs area, like Southwestern Minnesota, is subject to extremely low temperatures in the winter and high temperatures in the summer, SW/WC believed that the Widefield



School District's situation would be more analogous to the conditions which would be faced in the SW/WC service area. The visit to Widefield School District – conceived, paid for, and carried out entirely by SW/WC and without any notification to Trillion or any other vendor – reassured SW/WC's staff that a wireless solution could be viable even given the extremes of climate and geography in the SW/WC service area. This also convinced the SW/WC staff that a technology neutral approach – rather than one limiting the kinds of technologies that could be used to deliver the service – would be the best path to take when issuing the RFP later that fall.

Rather than a competitive bidding violation, these two trips constitute due diligence on the part of SW/WC. In seeking to determine the viability of various solutions, SW/WC was engaging in precisely the kind of activity that the Telecommunications Act of 1996 sought to encourage: fostering competition between different technologies in an underserved market. SW/WC was inclined to seek a technology neutral approach because this would yield the best pricing and create the most competitive marketplace, but SW/WC staff had remained unsure as to whether a wireless solution would be viable. Although the various wireless vendors insisted such a solution would be viable, SW/WC staff sought additional assurances, including proof from existing wireless networks. By taking two trips to observe existing wireless networks, SW/WC engaged in precisely the kind of due diligence that applicants to the E-rate program should take in order to ensure that their bona fide requests for services lead to purchases (paid for in part by universal service funds) that effectively meet their educational needs. Such research does not, and should not, constitute improper involvement by the vendor in the competitive bid process. As the technology neutral RFP and subsequent competitive bid evaluation process amply demonstrated, no vendor was given preferential treatment (or unduly disadvantaged) based on the results of this research.

Once SW/WC had determined that wireless technologies were capable of delivering both the speeds necessary and the reliability necessary for the WAN, SW/WC staff undertook the drafting of an

RFP to outline the services sought. Once the drafting of the RFP began in the Fall of 2005, SW/WC refused to have any additional contact with any vendor until after the competitive bidding process was completed. As mentioned above, the RFP itself was drafted in a technology neutral fashion to allow all possible bidders, regardless of the technology used for the delivery of services, to compete on a level playing field. The RFP and accompanying Form 470 attracted bids from three separate vendors (2 wireless, one wireline).

All three bids (from MCI, Conterra, and Trillion) were reviewed for compliance with the requirements of the RFP, and then the two bids which met the specifications of the RFP were directly compared to one another.<sup>7</sup> The bid evaluation process was conducted in compliance with state and local law, but more importantly, the bid evaluation process was conducted in compliance with the requirements of the E-rate program. As noted below, the non-subjective price of the eligible goods and services was the ultimate deciding factor. The solution proposed by Trillion costing roughly half as much as the solution proposed by Conterra. SW/WC ultimately selected the lowest cost vendor (Trillion) as the most cost-effective means of delivering the WAN.

USAC has failed to set forth any evidence to indicate that the bid process in this case was influenced by any contact that SW/WC had with any vendor during the feasibility study. Further, there is no evidence of improper conduct with vendors following the feasibility study. Because of this, there is no conceivable basis on which USAC can support its allegations that the bid process was conducted in a fashion that was anything but fair and open.

### ***Jackson County Procurement***

The second procurement covered under this appeal deals with the addition of a school district, Jackson County Central School District (JCC), to the existing WAN. JCC had been unable to be part of the

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<sup>7</sup> The bid from the wireline provider, MCI, was rejected for failing to provide the levels of bandwidth listed in the RFP.

original FY2006 procurement, but wanted to join the WAN starting in FY2008. SW/WC released an RFP and, per program rules, a Form 470 outlining the services sought. In this procurement, there was only one respondent – Trillion. In order to ensure that the price was competitive, SW/WC compared the costs to those that were included in the original WAN proposal. While the Trillion cost to add JCC to the network was higher on an annual basis than the cost per site in Trillion’s original WAN proposal, the cost per site was still slightly less than the cost per site in the Conterra proposal for the original WAN. Since the timeframe for the contract was shorter than that of the original WAN proposal (as the JCC addition would be coterminous with the original WAN proposal) SW/WC determined that this was a fair cost comparison, and that based on such a comparison, the Trillion bid was cost effective. Since Trillion was the only bidder, and because the bid met all the requirements of the RFP and 470 and was cost-effective, SW/WC awarded the contract to Trillion.

Although SW/WC already had a working relationship with Trillion extending from its original WAN agreement, Trillion was not given any information in relation to the JCC procurement that was not also available to other vendors in the form of the RFP and Form 470. Since SW/WC has never received an accurate accounting of expenses associated with SW/WC from USAC or Trillion, SW/WC has been unable to accurately determine what additional issues USAC may believe are associated with the SW/WC application. However, the listing of expenses presented by USAC as part of its 6/4/2010 letter does not include any significant expenses or gifts that would appear to violate program rules.

### ***Additional Connectivity Procurement***

In the Fall of 2009, as the bandwidth requirements of the various schools connected to the SW/WC WAN continued to increase, it became clear that the existing Internet connection was insufficient to meet the needs of the WAN members. In addition, WAN members were seeking to access the multitude of resources – primarily bandwidth intensive video resources – which were available to

educators via Internet2. In order to meet these needs, SW/WC released an RFP and Form 470 for FY2010 requesting that vendors bid on the provision of bandwidth to the existing SW/WC WAN to provide both augmented Internet connectivity and connectivity to Internet2.

SW/WC received three bids in response to the FY2010 RFP and Form 470. One of the three bids (Qwest) was rejected because it failed to meet the terms of the RFP. The bid from Qwest communications was very vague and failed to provide pricing for any of the services requested. It was very clear that this was a boiler plate response that Qwest was sending to anyone requesting Digital Transmission Services on a Form 470 rather than a response tailored to the needs identified in the establishing Form 470. SW/WC did send a follow-up e-mail to Qwest requesting a bid for the specific services requested in the Form 470, but no such response was ever received. Of the two remaining bids (one from Trillion and one from the Northeast Service Coop [NESC]), both bids were awarded the same scores on all categories other than price. Since those scores were the same, Trillion's bid was selected as the winning vendor because service from Trillion was bid at a cost slightly more than half that of NESC (\$26,792.70 annually vs. \$50,274/annually). As with all prior bid evaluations undertaken by SW/WC, the FY2010 bid evaluation was conducted in accordance with FCC rules, using the price of eligible goods and services as the primary factor.

In summary, of the three procurement processes in question here, Trillion won two of them based exclusively on having the lowest price. In the third procurement, Trillion was the only bidder, but SW/WC compared the pricing to that presented in the larger, longer term WAN contract to ensure that the prices were cost competitive. All three procurements were structured in a technology and vendor neutral fashion in order to maximize competition. In no case was the competitive bid process conducted in anything other than a fair, open, and competitive manner.

### **Trillion Conferences**

USAC's letter of 6/4/2010 also alleged that SW/WC staff inappropriately accepted invitations to two separate conferences, one in August 9-10, 2007, and one in June 24-25, 2008.<sup>8</sup> These conferences were set up by Trillion to serve as demonstrations of best practices among the various Trillion customers. SW/WC was invited to participate and present at these two conferences. SW/WC informally presented on the initiatives that were being undertaken using the network, including the deployment of broadband to otherwise unserved and underserved areas, the expansion of distance learning, and the benefits of high-speed networking to rural educational institutions. Thanks in large part to its high speed wireless network, SW/WC has been able to offer new educational resources and opportunities to the wide array of rural districts located throughout the SW/WC service area. As discussed above, SW/WC services have allowed foreign language, advanced mathematics, animal science, and many other courses to students, not to mention the nearly limitless resources of the Internet and the provision of access to video conferencing resources between districts throughout the State of Minnesota and the nation.

SW/WC also presented on the expanded video conferencing capabilities that the WAN and Internet access has made possible for its member school district, such as virtual field trips. Students at member school districts have used live, two-way video to interview a number of unique individuals, such as holocaust survivors and U.S. Senators and Representatives, and these interviews have been integrated into the learning experiences of the students involved. There were a number of other topics discussed, including shared services among districts through their co-ops and to schools within a single district. SW/WC also discussed how member school districts have been able to receive additional services, including hosted finance, human resource and student information systems. This has saved member school districts the expenses associated with running their own servers, and the data backup

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<sup>8</sup> Please note that trips to Texas in the summer certainly do not constitute luxury vacations.

and replication necessary for these mission critical operations. SW/WC staff also discussed some of the services provided to participating districts by SW/WC, including hosting shared Email accounts, SPAM filtering, content filtering, intrusion detection, and how member districts would not individually be able to afford or employ capable staff to accomplish on their own. SW/WC is able to leverage shared hardware and software resources, as well as staff expertise, through the WAN to bring schools affordable access to these services.

Although this conference was hosted by Trillion, the benefits and opportunities discussed at were not services unique to Trillion. Rather, the kinds of services discussed by SW/WC (and many other participants) were functions of having broadband connectivity from *any* cost-effective service provider, not Trillion specifically. As such, the information exchanged at these conferences was vendor-neutral because an applicant could have deployed similar services over a WAN provided by any other broadband provider.

Most importantly, these discussions did not influence SW/WC's purchasing plans or competitive bid processes. Although Trillion did pay for transportation, lodging, and meals for the SW/WC staff at the conference, this benefit was offered solely in exchange for SW/WC presenting at the conferences. Participation in these events did not influence the bid evaluation processes for any of the FRNs awarded to Trillion; the events occurred long after the initial set of evaluations, and the conferences themselves were not concurrent (or even particularly close to) any of the subsequent competitive bid processes. Moreover, SW/WC was unaware that these conferences would even exist at the time the initial five year contract was signed, more than a year and a half before the first of these events.

Although SW/WC does not believe that the pre-bid feasibility trip to NRETN or the participation in the two Trillion conferences constitute a violation of the FCC's rules, conversations with other current and former Trillion customers have indicated that USAC believes differently. In response to the USAC response, SW/WC has set up an escrow account with sufficient funding to reimburse all of the expenses

associated with these trips.<sup>9</sup> Should the Commission determine that the bid process was not tainted (which we believe is self-evident), but that SW/WC should not have accepted these “gifts,” SW/WC stands ready to reimburse all of those expenses to whichever party the Commission feels appropriate.

#### **Rules in Place at the Time Do Not Support Charges of Competitive Bidding Violations**

Over the almost 14 years since the First Report and Order was released on May 8, 1997, the Commission has addressed the competitive bidding process and violations of the competitive bidding process in a number of orders. While USAC has claimed, at various times, that SW/WC has violated these various Orders, no specific allegation in violation of any of the Orders has ever been made.

The most likely candidate for an alleged rule violation would be the Commission’s recent Sixth Report and Order,<sup>10</sup> which imposes strict new rules on competitive bidding. These rules appear to have come in response to the issues in the competitive bidding process encountered by other applicants, particularly in relation to Trillion. However, the rules in the Sixth Report and Order were issued almost five years after the first of the competitive bidding processes at issue in this appeal. As the Commission indicated in its *Guidance* on the Sixth Report and Order,<sup>11</sup> released December 15, 2010, the “specific gifts rules” from the Sixth Report and Order did not become effective until January 3, 2011 – more than five years after the first of the competitive bidding processes at issue in this appeal.

Since it is inconceivable (particularly given the *Guidance*) that the Commission would be applying specific gift rules retroactively to competitive bids completed five years prior to the Commission making those rules, it would appear that the alleged competitive bidding violation must stem from one of the other orders addressing the competitive bidding process. Indeed, USAC has alleged<sup>12</sup> violations of several such orders, including the *MasterMind* Order,<sup>13</sup> the *Ysleta* Order,<sup>14</sup> the

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<sup>9</sup> See Appendix 2.

<sup>10</sup> FCC 10-175, *Sixth Report and Order*, released September 28, 2010.

<sup>11</sup> See DA 10-2356, CC Docket 02-6.

<sup>12</sup> See 6/4/2010 letter from Pina Portanova at USAC to Josh Sumption, SW/WC, at pp.1-2.

*SEND* Order,<sup>15</sup> and the *Caldwell Parish* Order.<sup>16</sup> However, the issues addressed in these orders do not apply to the facts in this case.

#### *MasterMind* Order

The *MasterMind* Order deals with the surrender of control of the bid process to a service provider. In the *MasterMind* case, the applicants allowed a service provider, MasterMind, to serve as the contact for their Forms 470. The Commission ruled that:

[W]hen an applicant delegates [control of the bidding process] to an entity that also will participate in the bidding process as a prospective service provider, the applicant irreparably impairs its ability to hold a fair and open competitive bidding process. For example, other bidders may not receive from the contact person information of the same type and quality that the contact person retains for its own use as a bidder. If a bidder cannot, because it lacks critical information, determine how to best serve the applicant's requirements, the bidder cannot prepare a cost-effective proposal, thereby failing to achieve the intended goals of the competitive bidding process.<sup>17</sup>

Unlike the *Mastermind* case, there has never been any specific allegation made by USAC that the SW/WC surrendered control of the bid evaluation process (or any aspect of the competitive bidding process) to a service provider. Indeed, SW/WC maintained exclusive control of the bid evaluation process from start to finish, and the only input from service providers was on a neutral basis, prior to release of the RFP, as permitted by E-rate rules.<sup>18</sup>

#### *Ysleta* Order

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<sup>13</sup>See *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028-4032-33, ¶ 10 (2000), hereinafter *MasterMind*.

<sup>14</sup>See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Rcd 6858, 60 (2003), hereinafter *Ysleta*.

<sup>15</sup>See *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007), hereinafter *SEND*.

<sup>16</sup>See *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008), hereinafter *Caldwell Parish*.

<sup>17</sup>*MasterMind* Order, para. 10.

<sup>18</sup> See <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx>



Under the *Ysleta* Order, applicants were posting over-broad Forms 470, making an award to a “systems integrator,” and then allowing the systems integrator to effectively determine what services were needed and what those services would cost. This circumvented the Commission’s requirements that applicants provide sufficient information to allow vendors to bid on the services sought and that applicants select the most cost-effective service offerings since actual items to be purchased were not effectively listed in the Form 470 and the costs of those items were not included in the systems integrators’ bids.<sup>19</sup> As such, the applicant in *Ysleta* did not have sufficient information to determine whether the bids were cost effective and vendors were unable to competitively bid.

Neither argument applies to the competitive bid processes under appeal here. In every case in which bids were sought, SW/WC released RFPs that described in detail the services sought. These RFPs were specifically written to be vendor and technology neutral in order to promote competition and to allow SW/WC to select the most cost effective offerings. Each bid response included specific pricing for the services sought, and such pricing served as the basis of the bid evaluation process. Because detailed bids were received in response to each RFP release, and because, in virtually every competitive bid, SW/WC was able to attract bids from multiple vendors there is no evidence that the RFPs released in this case contained insufficient information to allow vendors to bid competitively. Moreover, in the case that a vague bid was received (from Qwest) SW/WC took steps to procure more detail on the bid before bid comparison was undertaken.

The *Ysleta* Order also definitively indicated that the price of the eligible goods and services must be the primary factor in the bid evaluation process (in other words, that it must be weighted more heavily than any other factors in the bid evaluation). Please note that, in each of the bid evaluations under discussion, price was weighted more heavily than any other factors in the bid evaluation.

Given the facts of the case, it’s clear the requirements of the *Ysleta* Order were not violated.

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<sup>19</sup> See *Ysleta* Order, para. 21-22.

## *SEND* Order

In the *SEND* Order, the Commission determined that pattern analysis alone was insufficient to determine whether an application violated program rules, and that vendor involvement in the competitive bid process, if not conducted on a neutral basis, could violate the Commission's competitive bidding rules (reaffirming the *MasterMind* decision).<sup>20</sup> In this, however, the only vendor involvement ever mentioned by the USAC in its allegations related to SW/WC's pre-RFP research to determine the feasibility of using a non-traditional solution for the WAN. In particular, SW/WC sought information from vendors (including Trillion) on the feasibility of using wireless technologies to develop the WAN, rather than the traditional fiber optic solutions. As outlined below, no service provider was given any information that was not publicly available to any other vendor, nor did the involvement of any vendor extend beyond the determination of feasibility. This neutral assistance from vendors allowed the RFP and Form 470 to be crafted in a purely technology-neutral fashion, allowing for the greatest level of competition and the most cost-effective results. Service providers were not in any way involved in the creation of the RFP or the Form 470; these tasks were undertaken solely by the staff of SW/WC. Simply put, there was no vendor involvement in the RFP or Form 470 creation, nor in the bid evaluation process. Given these facts, *SEND* does not appear to apply to the appeal at hand.

As a side note, the *SEND* Order specifically cited the 2001 SLD presentation on "Enforcement Review" as providing the guidelines for the appropriate roles for service providers in a competitive bid.<sup>21</sup> This presentation expressly permits the kind of neutral assistance that SW/WC received during its feasibility study. The presentation went on to list the roles that service providers are barred from

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<sup>20</sup> See *SEND Order*, para. 10-16.

<sup>21</sup> See *SEND Order*, footnote 50.

playing in the application process.<sup>22</sup> There is no evidence that any of the rules listed in this presentation were violated, nor have any specific allegations been made that such rules were violated.

#### *Caldwell Parish Order*

The *Caldwell Parish* decision cited in USAC's June 4, 2010 letter to SW/WC is an extension of the *SEND Order* discussed above. The *Caldwell Parish* decision held that, in that specific case, USAC had failed to seek sufficient information from the applicants to determine that the competitive bidding process had been tainted (in that specific case, by service provider involvement in the drafting of the Form 470).<sup>23</sup> In those cases where the service provider was improperly involved in drafting of the Form 470, however, USAC's denials were upheld.<sup>24</sup> This decision is entirely irrelevant to the applications at issue in this appeal. USAC has not alleged that Trillion or any other service provider was directly involved in the competitive bidding process, nor has USAC indicated that SW/WC's applications were flagged by pattern analysis because they bore a resemblance to another applicant's forms. In fact, given that SW/WC developed unique Form 470s and/or RFPs for each of the services sought, and each time they were sought, SW/WC adamantly disputes that the *Caldwell Parish* holding applies to the instant appeal.

If *Caldwell-Parish* does apply to this case it is because USAC failed to seek sufficient information from the SW/WC before determining whether a violation occurred. While USAC did seek information from SW/WC, SW/WC's responses to such requests appear to have been completely ignored. This failure on the part of USAC should not result in denials or recoveries directed at SW/WC.

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<sup>22</sup> See USAC 2001 Training Materials (Enforcement Review), <http://www.usac.org/res/documents/sl/ppt/Enforcement%20Review.ppt>, retrieved 1/18/2011, slides 23-32.

<sup>23</sup> See *Caldwell Parish*, para. 10,

<sup>24</sup> See *Caldwell Parish*, para. 15.

### **Competitive Bid Process was Conducted in a Fair and Open Fashion, in Compliance with FCC Rules**

Throughout this entire process, despite multiple allegations, USAC has never presented any evidence to indicate that the competitive bid process was, in any way, influenced by any vendor. As outlined above, the only way in which the competitive bid process was influenced was to affirm that SW/WC could and should seek a technologically neutral approach to meeting the WAN needs of its members. Additionally, in the two competitive bids in which there were multiple bids, the determining factor for the vendor selection was price. For the initial WAN evaluation and the additional connectivity evaluation, vendors scored identically on the subjective criteria, leaving price as the determining factor.<sup>25</sup> The lowest price bid (which cost roughly half as much as the other bid in both cases) won the competitive bid process. This is in accordance with both the rules and intent behind the E-rate program.

While the Jackson County addition to the WAN only drew a single bid, the bid from the vendor was price competitive with the second place bid that had been received in the WAN bid. While such a comparison may not be necessary under program rules, we believed that this was the best way to determine whether the bid received was cost-effective and competitive. As such, SW/WC was able to determine that the bid was cost effective, and selected the sole bid received as the winning bid.

The Commission's rules require applicants to conduct a fair and open competitive bid process, and to conduct a bid evaluation to find the most cost effective solution, using price as the primary factor. Given the number of bids received, and taking into account the rural nature of the area being served, the level of competition in the bidding process itself demonstrates that the process was fair, open, and competitive. In addition, the result of the bid evaluation process was to find the most cost effective solution. In all of the comparisons, the price of eligible goods and services was the primary factor. Indeed, had price been the sole factor used in the bid evaluation process, the results would have

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<sup>25</sup> It is worth noting that, had the competitive bid process been skewed towards a particular vendor, such favoritism would show up in the more subjective measures, rather than the absolute measure represented by price. Given that both vendors scored identically on the subjective measures, USAC's claims of bias in favor of one particular vendor seem wholly misguided.

been no different. As such, the end results of the process speak for itself; SW/WC's fair and open competitive bid process led to the best quality services available being delivered at the lowest possible prices – in compliance with both the rules and intent of the E-rate program.

### **Request for Waiver**

As stated above, SW/WC has not violated any of the procurement requirements associated with the E-rate program. SW/WC conducted fair, open, competitive bid processes, and selected the most cost effective solutions, using price as the primary factor. The voluminous evidence which has been presented to USAC made this point clear, and that USAC's staff simply failed to process the information supplied should not be held to SW/WC's detriment.

However, should the Commission determine that its rules were violated by SW/WC, SW/WC requests that the Commission waive its rules with respect to the funding requests addressed in this appeal. If any violation of Commission's rules did take place, SW/WC was wholly unaware of such a violation and did not commit the infraction willfully.

If a violation did occur, said violation did not influence the competitive bidding processes associated with the FRNs at issue in this appeal. SW/WC strived to facilitate and engage in a fair, open, competitive bid process. SW/WC has presented the bid evaluation documentation which shows that price was the determining factor in the two bids where there was competition, and that the price was used in the third bid to determine whether the bid itself was cost-effective. Had the bid evaluation processes been tainted, the more subjective measures in the bid evaluation process would likely show the results of the undue influence. But, in no case did Trillion score higher than its competitors in any category other than price. Combined with the fact that SW/WC was able to attract multiple bids on services being delivered in rural Minnesota for two of the three procurements, we believe that the results speak for themselves.

Finally, should the Commission uphold USAC's allegations, the results for SW/WC and the students it serves would be devastating. To date, up to \$3,740,220.87 is at stake in this appeal. Loss of this substantial sum would put an additional and unnecessary burden on each of the member school districts served by SW/WC, approximately \$200 per student should this funding not be restored. At a time when every effort is being made by the member school districts to cut dollars and cents from their budgets while attempting to prevent further reductions in educational services being provided to students, a loss of \$200 per student would also severely impair the quality of the education provided by the SW/WC member school districts. If the Commission decides to uphold USAC and collect these funds from SW/WC, the most foreseeable result would be the immediate collapse of the WAN and most of SW/WC's IT related efforts. This collapse would, in the short term, deny the member school districts access to the multitude of services they currently access through the WAN, and would ultimately result in SW/WC needing to collect the discounts from the school districts participating in the WAN. Such expenses, would be similarly devastating for the districts.

Because the Commission has the authority to waive its own rules when doing so is in the public interest,<sup>26</sup> SW/WC requests that, if the Commission determines there has been a rule(s) violation, the Commission waive such violation(s) for the reasons stated above.

### **Conclusion**

SW/WC has cooperated fully with USAC for several years as USAC has undertaken an investigation into the Trillion. But, USAC has failed to demonstrate that SW/WC has violated of the rules in place at the time that SW/WC's bid competitions occurred. Instead, the facts in this case indicate that the competitive bid processes run by SW/WC were fair, open, and technologically neutral. No vendor was given preferential treatment, and no vendor was disadvantaged by the process. Ultimately, the

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<sup>26</sup>*Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

competitive bid processes each resulted in the most cost effective bid response being selected as the winning vendor.

Should the Commission determine that a violation of the rules did occur, we ask that the Commission waive its rules for good cause. Denying the funding associated with the funding requests covered by this appeal will not serve the public interest, but instead will merely disadvantage students in rural Southwestern and Western Minnesota – precisely the kinds of students that the E-rate was designed to help.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Cliff Carmody". The signature is fluid and cursive, with the first name "Cliff" being more prominent and the last name "Carmody" following in a similar style.

February 18, 2011

Cliff Carmody  
Executive Director  
Southwest/West Central Service Cooperative  
507-537-2240

## Appendix I.

The below table indicates the Funding Request numbers in appropriate funding years that are discussed throughout this document as well as which procurement phase the FRNs are discussed in.

<b>Funding Year</b>	<b>Funding Request Number</b>	<b>Procurement Phase</b>
2006	1428042	WAN Procurement
2006	1428122	WAN Procurement
2007	1554027	WAN Procurement
2007	1554041	WAN Procurement
2008	1666544	WAN Procurement
2008	1683953	Jackson County Procurement
2008	1666538	WAN Procurement
2009	1897509	Additional Connectivity Procurement
2009	1810845	WAN Procurement
2009	1810843	WAN Procurement
2009	1811052	Jackson County Procurement
2010	2012807	WAN Procurement
2010	2012857	Jackson County Procurement
2010	2035509	Additional Connectivity Procurement
2010	2012828	WAN Procurement



## Appendix II.

Affidavit from the law firm of Ratwik, Roszak& Maloney, P.A.

## AFFIDAVIT

IN THE STATE OF MINNESOTA                     )  
COUNTY OF HENNEPIN                         ) SS

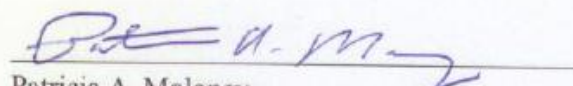
I, Patricia A. Maloney, being duly sworn, depose and state:

1. I am a partner in the law firm of Ratwik, Roszak & Maloney, P.A.
2. Our firm has on deposit \$2,851.27 in the Ratwik, Roszak and Maloney, P.A. Trust Account for SW/WC Service Cooperative.
3. These funds are being held for the repayment of costs associated with travel and expenses funded in whole or part by Trillion Partners.
4. Three possible payees for the funds are Trillion Partners, Inc., the Federal Communications Commission, or the Universal Service Administrative Company; or agents thereof.
5. Payment of these funds is pending action by the Federal Communications Commission or the Universal Service Company.
6. These funds will not be released prior to action by the Federal Communications Commission or the Universal Service Administrative Company.

Further this affiant saith not.

Date:

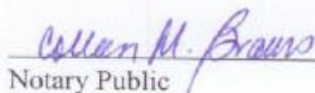
2/9/11



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SUBSCRIBED AND SWORN TO before me

This 9th day of February, 2011

  
Notary Public

